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No. 84-366

IN THE

Supreme Court of the United States

October Term, 1984

RAY BELL OIL COMPANY, INC.,
Appellant,

vs.

STATE OF NEW MEXICO,
Appellee.

ON APPEAL FROM THE NEW MEXICO COURT OF APPEALS

APPELLEE'S MOTION TO DISMISS

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October Term, 1984

RAY BELL OIL COMPANY, INC.,
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vs.

STATE OF NEW MEXICO,
Appellee.

ON APPEAL FROM THE NEW MEXICO COURT OF APPEALS

MOTION TO DISMISS

The State of New Mexico ("State") respectfully moves to dismiss this appeal on the following grounds:

1. The appeal is not within the jurisdiction of the Court, since there has been no decision by a State court as required by 28 U.S.C. Section 1257(2).

2. The question sought to be reviewed is moot and thus presents no justiciable case or controversy.

SUPPLEMENTAL STATEMENT OF FACTS

In May of 1982, a New Mexico grand jury indicted Appellant and others for violation of New Mexico's antitrust laws. *See* Sections 57-1-1 to 57-1-15, NMSA 1978, set forth in Appendix to Jurisdictional Statement at 27A-36A. The indictment charged a conspiracy to fix the retail price of gasoline. Appellant was charged alternatively under two subsections of the state statute. The first charge was based on Part A of Section 57-1-1 NMSA 1978 ("Part A"), which provides that:

> Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is hereby declared to be unlawful.

The second charge was based on Part B of Section 57-1-1 NMSA 1978 ("Part B"), which provides that:

> Every contract, agreement, combination or conspiracy which controls the quantity, price or exchange of any article of manufacture, product of the soil or mine or any goods or services in restraint of trade is hereby declared to be unlawful.

Both alternative charges were alleged to have been intentionally committed. *See* Indictment, set forth in Appendix, *infra.*

Appellant moved to dismiss the charge brought under Part A of the statute. Appellant contended that where price-fixing is charged, Part A is less specific than Part B and therefore superceded by it. The trial court granted Appellant's motion and dismissed that portion of the indictment.

The State appealed the dismissal to the New Mexico Court of Appeals. The sole issue presented was whether Part A of Section 57-1-1 had been properly charged. The Court of Appeals reversed and held that:

> [t]he trial court erred in dismissing the charge under Section 57-1-1(A), and in ruling that a conspiracy to control [prices] must be prosecuted under Section 57-1-1(B). The charges, being in the alternative, were proper in that one crime was charged as having been committed in two ways.
>
> Opinion of New Mexico Court of Appeals, quoted in Appendix to Appellant's Jurisdictional Statement at 7A.

Appellant's first due process claim was raised in its motion for rehearing to the New Mexico Court of Appeals. The Court of Appeals denied rehearing. Appellant attempted to raise this claim again in its petition for writ of certiorari to the New Mexico Supreme Court. Appellant's petition was granted, but the writ was later quashed as "having been improvidently issued." There was no opinion by the New Mexico Supreme Court. *See* Appendix to Jurisdictional Statement at 20A-23A.

On August 9, 1984, the State filed notice of nolle prosequi in the instant case of the alternative charge brought under Part B of the statute.[1] *See* Appendix, *infra.*

ARGUMENT

POINT I

THE APPEAL IS NOT WITHIN THE JURISDICTION OF THE SUPREME COURT.

This appeal has been taken under 28 U.S.C. Section 1257(2), which provides in pertinent part that:

---

[1] As a practical matter, the State could not dismiss the charge under Part B until the appellate courts determined that Part A of the statute did indeed apply to price-fixing.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of the statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellant seeks review by this Court of a significant constitutional question: the due process limitations of strict liability in a criminal antitrust context. However, the question has not been decided by the New Mexico courts. It is therefore outside the Supreme Court's appellate jurisdiction under 28 U.S.C. Section 1257(2).

Strict liability has never been an issue in this case. The grand jury charged an intentional violation. At the outset, the State stipulated that its theory under either alternative charge was an agreement to fix prices. *See* Court of Appeals Opinion, Appendix to Jurisdictional Statement at 6A and 10A. The only question before the New Mexico Court of Appeals was whether the charge under Part A had been improperly dismissed. The Court of Appeals reversed and held that "[t]he charges, being in the alternative, were proper in that one crime was charged as having been committed in two ways." The Court also took the opportunity to announce that "[n]o intent is required" for violation of Part B. *See* Opinion, quoted in Appendix to Jurisdictional Statement at 7A.

Appellant subsequently attempted to raise its constitutional concerns. However, Appellant was unsuccessful in soliciting a ruling: the Court of Appeals refused rehearing and the New Mexico Supreme Court granted but then quashed its writ of certiorari. Under New Mexico law, the correct procedure is to raise the issue in the trial court and then, if necessary, appeal

the ruling. *See, for example, Provencio v. New Jersey Zinc. Co.*, 86 N.M. 538, 542, 525 P.2d 898, 902 (N.M. Ct.App.), *cert. denied*, 86 N.M. 528, 525 P.2d 888 (1974) (due process claim).

The jurisdiction of this Court lies to review decisions of a State's highest court. 28 U.S.C. Section 1257(2). Without a decision, there is no jurisdiction. *Miller v. Nicholls*, 17 U.S. (4 Wheat.) 310 (1819); *Street v. New York*, 394 U.S. 576, 581-582 (1969). Clearly, no New Mexico court has addressed, let alone decided, the question at bar. The appeal should be dismissed for want of jurisdiction.

POINT II

THE QUESTION SOUGHT TO BE REVIEWED IS MOOT AND THUS PRESENTS NO JUSTICIABLE CASE OR CONTROVERSY.

The existence of an actual controversy is essential to the jurisdiction of this Court under Article III of the Constitution. The Court does not rule on moot questions, nor on hypothetical ones. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 229, 240-241 (1937).

As to Appellant, the question raised by this appeal is moot. The State has dismissed the charges against Appellant based on Part B of Section 57-1-1 NMSA 1978. *See* Appendix, *infra; and see* fn.1 *supra.* Appellant is under no conceivable threat of harm by an unconstitutional application of Part B.

Future defendants can raise all objections to this statute, constitutional or otherwise, in the New Mexico trial courts. They can have adverse rulings reviewed by the New Mexico appellate courts and by the Supreme Court. However, this Court has at bar no justiciable case or controversy. The appeal should be dismissed.

CONCLUSION

For the foregoing reasons, the Supreme Court should dismiss this appeal and remand the case back to the New Mexico courts for trial.

Respectfully submitted,

PAUL BARDACKE
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Counsel for Appellee

APPENDIX

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GRAND JURY INDICTMENT 1a

NOTICE OF NOLLE PROSEQUI[2] 3a

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[2] The different Cause Numbers on the pleadings result from a stipulated change of venue, from Dona Ana County to Bernalillo County, New Mexico.

STATE OF NEW MEXICO COUNTY OF DONA ANA
IN THE DISTRICT COURT

STATE OF NEW MEXICO, Plaintiff, vs. J. B. RITTER DISTRIBUTING COMPANY, a limited partnership; W. K. "AJAX" SIMPSON; RAY BELL OIL COMPANY, INC., a corporation; and HARRY M. BUSH, JR., Defendants.	))))))))	No. CR - 82 - 94 Restraint of Trade; contrary to Sections 57-1-1, 6 NMSA 1978 (1981 Supp.) (one count per defendant) Fourth degree felony

GRAND JURY INDICTMENT

The Grand Jury charges:

Between the dates of July 1, 1979 and March 12, 1982, in Dona Ana County, State of New Mexico, the above-named defendants, J. B. Ritter Distributing Company, W. K. "Ajax" Simpson, Ray Bell Oil Company, Inc., and Harry M. Bush, Jr., intentionally contracted, agreed, combined, or conspired, one with another or with others, in restraint of trade or commerce, to fix, stabilize, maintain, or control the price of gasoline sold at retail gasoline stations in Dona Ana County, State of New Mexico, contrary to Sections 57-1-1, 6 NMSA 1978 (1981 Supp.), a fourth degree felony; or, in the alternative, the above-named defendants intentionally formed a contract, agreement, combination, or conspiracy, one with another or with others, which controlled the quantity, price or exchange of any article of manufacture, product of the soil or mine or any goods or services in restraint of trade; namely, gasoline sold at retail gasoline stations in Dona Ana County, State of New Mexico, contrary to Sections 57-1-1, 6 NMSA 1978 (1981 Supp.), a fourth degree felony.

Defendant J. B. Ritter Distributing Company is a limited partnership managed by defendant W. K. "Ajax" Simpson.

Defendant Ray Bell Oil Company, Inc. is a New Mexico corporation which has employed defendant Harry M. Bush, Jr. as manager of its operations in Dona Ana County, State of New Mexico.

The names of the witnesses upon whose testimony this indictment is based are Steve Davis, Amy Alexander, Orlando Salazar, Earl Byers, Sidney Adams, Angel Baca, Terry York, William Markle, Ray L. Foreman, Skip Foreman, Alton Vaughn, Bobby Melton, Gerald A. Riopelle, John Herbert Charles, John Sleever, Franklin McKinney, Marvin Hillger, Scott Hillger, Jack Sharp, Lewis K. Thompson, Harry Sanchez, and Ross Becker.

I hereby certify that the foregoing indictment is a TRUE Bill.

/s/ Neri G. Frietze
FOREMAN

13 May, 1982
DATES

APPROVED:

/s/ James J. Wechsler
ASSISTANT ATTORNEY GENERAL

IN THE SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff,

vs. No. CR-35807

RAY BELL OIL COMPANY, INC.,
Defendant.

NOTICE OF NOLLE PROSEQUI OF ALTERNATIVE CHARGE OF THE INDICTMENT BROUGHT UNDER SECTION 57-1-1 (B), NMSA 1978, AS AMENDED

AND

NOTICE OF INTENT TO PROCEED TO TRIAL ON ALTERNATIVE CHARGE OF THE INDICTMENT BROUGHT UNDER SECTION 57-1-1 (A), NMSA 1978, AS AMENDED

COMES NOW the State of New Mexico and hereby notifies the defendant that the charge of the indictment brought under Section 57-1-1 (B), NMSA 1978 as amended; namely:

> . . . the above-named defendants intentionally formed a contract, agreement, combination or conspiracy, one with another or with others, which controlled the quantity, price or exchange of any article of manufacture, product of the soil or mine or any goods or services in restraint of trade; namely, gasoline sold at retail gasoline stations in Dona Ana County, State of New Mexico . . .

will not be prosecuted further by the State of New Mexico.

Defendant is hereby notified that the State intends to proceed to trial only on the alternative charge of the Indictment brought under Section 57-1-1 (A), NMSA as amended; namely:

> (the defendant) intentionally contracted, agreed, combined, or conspired, one with another or with others, in restraint of trade or commerce to fix, stabilize, maintain or control the price of gasoline sold at retail stations in Dona Ana County, State of New Mexico . . .

as interpreted by the New Mexico Court of Appeals in the case of *State v. Ray Bell Oil Company, Inc.*, No. 6045, filed May 24, 1983.

Respectfully submitted,

PAUL BARDACKE
Attorney General

/s/ Stephen Westheimer
STEPHEN WESTHEIMER
Assistant Attorney General

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Santa Fe, New Mexico 87504
827-6000

I hereby certify that a true copy of the foregoing was mailed to Charles W. Daniels, Esq., opposing counsel of record on the 9th day of August, 1984.

/s/ Dan Pearlman
Assistant Attorney General